UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL MOORE,	:	00 Civ. 4560 (AJP) (98 Cr. 833)
Petitioner,	:	
-against-	:	**OPINION AND ORDER**
UNITED STATES OF AMERICA,	:	
Respondent.	:	

ANDREW J. PECK, United States Magistrate Judge:

Pro se petitioner Samuel Moore has petitioned, pursuant to 28 U.S.C. § 2255, to vacate his June 14, 1999 conviction, upon his plea of guilty, for conspiracy to sell heroin in violation of 21 U.S.C. § 846, and sentence to 102 months imprisonment. Moore claims that: (1) he received ineffective assistance with respect to his guilty plea, (2) he received ineffective assistance with respect to sentencing, and (3) his indictment was defective because it failed to specify an amount or type of drugs for which Moore was personally responsible.

The parties have consented to decision of this matter by a Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Dkt. No. 108.)[1/]

For the reasons set forth below, Moore's petition is DENIED.

[1/] References to docket numbers are to those in 98 Cr. 833.

FACTS

The Indictment

On July 30, 1998, petitioner Samuel Moore was indicted along with Christopher Rodriguez and Darren Lee for conspiracy to distribute and possess with intent to distribute more than one kilogram of heroin and more than five kilograms of cocaine in violation of 21 U.S.C. § 846. (See, e.g., Ex. A[2/]: Plea Agreement at 1; Ex. B: 1/26/99 Plea Transcript ["Plea Tr."] at 5-7; Ex. C: Presentence Report ("PSR") ¶ 1; Dkt. No. 109: 10/16/00 Moore Aff. at 2-4.)

The one-count indictment charged as follows:

> 1. From in or about January 1997, through on or about April 2, 1998, in the Southern District of New York and elsewhere, CHRISTOPHER RODRIGUEZ, DAREN LEE, a/k/a "Sugar," and SAMUEL MOORE, a/k/a "Sammy," the defendants, and others known and unknown, unlawfully, intentionally and knowingly did combine, conspire, confederate and agree together and with each other to violate the narcotics laws of the United States.
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> 2. It was a part and object of such conspiracy that CHRISTOPHER RODRIGUEZ, DAREN LEE, a/k/a "Sugar," and SAMUEL MOORE, a/k/a "Sammy," the defendants, and others known and unknown, would and did distribute and possess with intent to distribute one kilogram and more of mixtures and substances containing a detectable amount of heroin in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.
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> 3. It was a further part and object of such conspiracy that CHRISTOPHER RODRIGUEZ, DAREN LEE, a//k/a "Sugar," and SAMUEL MOORE, a/k/a "Sammy," the defendants, and others known and unknown, would and did distribute and possess with intent to distribute five kilograms and more of mixtures and substances containing a detectable amount of cocaine in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

[2/] "Ex." references are to the exhibits to the Government's Brief (Dkt. No. 106).

Overt Acts

4. In furtherance of said conspiracy and to effect the illegal objects thereof, the following acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about February 13, 1998, SAMUEL MOORE, a/k/a "Sammy," the defendant, called CHRISTOPHER RODRIGUEZ, the defendant, at (917) 701-5343 and discussed narcotics trafficking.

b. On or about March 11, 1998, CHRISTOPHER RODRIGUEZ and DAREN LEE, a/k/a "Sugar," the defendants, met in the vicinity of 8110 Pulaski Highway, Rosedale, Maryland.

c. On or about March 11, 1998, DAREN LEE, a/k/a "Sugar," the defendant, possessed approximately 360 grams of heroin in Baltimore, Maryland.

(Title 21, United States Code, Section 846.)

(Dkt. No. 62: Indictment.)[3/]

Moore was represented by James P. Manasseh and Robert J. Hildum of Louisiana, both appearing pro hac vice, throughout the pretrial period, at Moore's January 26, 1999 plea and at his June 15, 1999 sentencing. (See, e.g., Gov't Br. at 2; see also Ex. B at 1; Ex. D: 6/14/99 Sentencing Transcript ["S."] at 1.)

Moore's Plea Agreement

Moore's January 26, 1999 guilty plea was pursuant to a written plea agreement. (Ex. A: Plea Agreement.) In the plea agreement, the parties stipulated that: Moore's base offense level was 28, pursuant to U.S.S.G. §§ 2D1.1(a)(3) & 2D1.1(c)(6), because the offense involved between 400 and 700 grams of heroin; a two-level reduction in the offense level was warranted pursuant to U.S.S.G. § 3E1.1(a) for acceptance of responsibility; and a one-level reduction was

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[3/] Rodriguez and Lee plead guilty on January 21, 1999. (See, e.g., Gov't Br. at 2; see also Dkt. Entries 1/21/99; Dkt. Nos. 78, 84, 85.)

not warranted, pursuant to U.S.S.G. § 3E1.1(b)(2), because "as of the date of this [plea] agreement, [Moore] will not have timely notified the Government of his intention to enter a guilty plea." (Id. at 2.) The parties further stipulated that Moore's criminal history was in Criminal History Category IV. (Id. at 3.) Given these factors, the plea agreement contained a stipulated Sentencing Guidelines range of 92 to 115 months. (Id.)

In addition, the plea agreement contained the following stipulation:

> It is further agreed (i) that the defendant will neither appeal, nor otherwise litigate under Title 28, United States Code, Section 2255, any sentence within or below the stipulated Sentencing Guidelines range and (ii) that the Government will not appeal any sentence within or above the stipulated Sentencing Guidelines range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein.

(Id. at 4.)

Moore and his attorney, James Manasseh, signed the plea agreement letter on January 26, 1999. (Id. at 5.)

Moore's Guilty Plea

On January 26, 1999, two weeks before the scheduled trial date of February 8, 1999 (see, e.g., Gov't Br. at 2), Moore entered an unconditional plea of guilty. (Ex. B: 1/26/99 Plea Tr.) At the guilty plea proceeding before Judge Rakoff, Moore was represented by James P. Manasseh. (Plea Tr. 1-2.)

During the hearing, Judge Rakoff reminded Moore that he “ha[d] a right to be represented by counsel at every stage of [the] proceedings” and asked if Moore understood that, to which Moore responded, “Yes, I do, your Honor.” (Plea Tr. 5.) The colloquy continued:

> THE COURT: And if at any time you can't afford counsel, then the Court will appoint one for you free of charge. Do you understand that?
>
> THE DEFENDANT: Yes, I do, your Honor.
>
> THE COURT: And you are represented today by Mr. Manasseh. Are you satisfied with his representation?
>
> THE DEFENDANT: Yes, I am.
>
> THE COURT: Have you had a full chance to discuss this matter with him?
>
> THE DEFENDANT: Yes.

(Plea Tr. 5.)

Judge Rakoff recited the indictment to Moore. (Plea Tr. 5-7.) Moore confirmed that he had previously read the indictment, discussed the indictment with his counsel, and understood the charge against him. (Id. at 7.)

Judge Rakoff reviewed in detail with Moore "all the rights [Moore] ha[d] under the laws of the United States that [Moore would] be giving up if [he] plead guilty." (Plea Tr. 8.) Judge Rakoff explained that if Moore chose to go to trial, "even if [he] were convicted, [he] would have the right [to] appeal [his] conviction." (Id. at 9.) After determining that Moore understood that he would be giving up all of those rights if he plead guilty, Judge Rakoff asked, "And do you still want to plead guilty?" (Id.) Moore replied, "Yes, I do." (Id.)

After reciting the maximum and minimum punishments applicable to the charge in the indictment, Judge Rakoff asked Moore if he understood that "those are the maximum and mandatory minimum punishments that [he] face[d] if [he] plead guilty to count 1?" (Plea Tr. 10.) Moore replied, "Yes, your Honor, I do." (Id.) The plea colloquy continued as follows:

> THE COURT: Now in fact, however, the sentence will be substantially determined by certain laws called the sentencing guidelines which create a range within which

I must sentence you subject to certain upward or downward departures that may exist in unusual circumstances. And have you had a chance to go over that with your counsel?

THE DEFENDANT: Yes, I have, your Honor.

THE COURT: All right. Now, in that regard I have been furnished with a letter agreement dated January 25, 1999 between the government and your counsel . . . . And have you had a chance to read that letter agreement?

THE DEFENDANT: Yes, I have, your Honor.

THE COURT: And have you discussed it with your counsel?

THE DEFENDANT: Yes, I have.

THE COURT: Do you understand its terms?

THE DEFENDANT: Yes, I do.

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THE COURT: And did you sign it today in order to thereby indicate your agreement to it?

THE DEFENDANT: Yes, I did.

THE COURT: Now, that letter agreement is binding as between you and the government, but it is not binding on the Court. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: For example, the letter agreement states that you and the government are stipulating that the sentencing range under the guidelines as you and the government calculated leads to a range of 92 to 115 months, but I will have to do my own calculation, and I may agree or disagree with what you and the government have stipulated. Either way, if you plead guilty, you would be bound by my sentence. Do you understand that.

THE DEFENDANT: I wasn't quite aware of that.

THE COURT: Okay. Well, let's make sure that you do understand that, because I don't want you to plead guilty unless you fully understand and accept that.

What this plea agreement means is that the only position the government is going to take at sentence is that your sentence should be 92 to 115 months.

> The only position you are going to take at sentence is that your sentence should be 92 to 115 months. But because this agreement is not binding on me, I'm obligated to go and do my own calculation, and more often than not I agree with the calculations that the parties have come up with, but sometimes I disagree. And if I disagree and impose a sentence under a different calculation, you will still be bound by my sentence if you plead guilty. So, I want to make sure you understand that and accept that. So, do you understand it?
>
> THE DEFENDANT: Yes. So, in other words, you are saying that you can either go up or down compared to the 92 to 115 months based on your judgment.
>
> THE COURT: If I find that the calculation under the guidelines is different from the ones that you have found or that there is some upward or downward departure I need to apply. Now, I don't want to overstate this. More often than not when I look at the relevant laws I come to the same conclusion as the parties, because you have had a chance to apply the facts to the guidelines, and more often than not you get it right. But you don't always get it right. And if I have a different view – and it could be higher, it could be lower – you will still be bound by my sentence either way if you plead guilty. So you want to make sure you understand that.
>
> THE DEFENDANT: I understand.
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> THE COURT: And are you prepared to go forward with your plea?
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> THE DEFENDANT: Yes, your Honor.
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> THE COURT: Very good. Now, let me say more generally that if anyone has made any kind of promise or prediction or estimate as to what your sentence might be in this case, that person or persons could be wrong. Again, nevertheless, if you plead guilty you will be bound by my sentence. You understand that now?
>
> THE DEFENDANT: Yes.

(Plea Tr. 10-13, emphasis added.)

The Government and Moore represented that the letter agreement was "the entirety of any and all agreements of any kind" between them (Plea Tr. 13); Moore represented that no one other than the Government had made any promise to him or offered him anything in order to get him to plead guilty, and that no one had "threatened [him] or coerced [him] in any way to plead guilty" (id. at 14); and the Government represented that if the case were to go to trial, "it

could, through competent evidence, prove every essential element of th[e] crime beyond a reasonable doubt" (id.).

Judge Rakoff asked Moore's attorney, Manasseh, if he knew "of any valid defense that would prevail at trial or any other reason why his client should not plead guilty?" (Plea Tr. 14.) Manasseh replied that he and Moore had "gone through [Moore's] various defenses, on a number of occasions, particularly this weekend, while [counsel] . . . had a chance to get up and visit with [Moore]. Based upon that, [Manasseh] believe[d] what [Moore was] doing [was] in his best interest, his entering the guilty plea." (Id.)

When asked to state in his own words what he had done, Moore allocuted as follows:

> On about February the 13th of 1998, Christopher Rodriguez called me and we initially made an agreement to transport 300 grams of heroin from New York to Baton Rouge to be distributed in New Orleans, Louisiana.

(Plea Tr. 15.) The Government requested that Judge Rakoff ask Moore to clarify the amount of drugs involved:

> [T]he defendant mentioned the specific quantity of 300 grams. I would note that the parties have stipulated to an amount of heroin that is at least 400 grams but less than 700 grams. And for that reason, out of an abundance of caution, perhaps the defendant could also allocute that he was involved in additional transactions that exceeded 400 grams.

(Plea Tr. 16.) Judge Rakoff asked Moore, "is that correct?", and Moore replied, "Yes, that is correct." (Id.) Moore also confirmed that he was pleading guilty because he was guilty. (Id.) Judge Rakoff accepted Moore's guilty plea. (Id. at 16-17.)

Judge Rakoff informed Moore that in the next stage of the proceedings he would be interviewed by a probation officer who would prepare a presentence report and that Moore

would have an opportunity to comment on the report or make corrections. (Plea Tr. 17.) Judge Rakoff scheduled sentencing for June 14, 1999. (Id. at 17-18.)

The Presentence Report

The Presentence Report ("PSR") concluded that: Moore's base offense level was 28, pursuant to U.S.S.G. § 2D1.1(c)(3), because the offense involved 400-700 grams of heroin (Ex. C: PSR ¶ 113), and that only a two-point reduction was applicable, pursuant to U.S.S.G. § 3E1.1(a), because the parties had stipulated that Moore "did not timely notify the Government of his intention to plead guilty" (PSR ¶ 119). The PSR also concluded that Moore did not deserve any points off for his role in the offense. (PSR ¶ 116.) Thus, Moore's adjusted offense level was 26. (PSR ¶ 120.) The PSR calculated that Moore had seven criminal history points and a resulting criminal history category of IV. (PSR ¶ 136.) The PSR calculated Moore's sentencing guidelines range to be 92 to 115 months (PSR ¶ 166), the same as in the plea agreement. Probation recommended that Moore receive a sentence in the middle of the guidelines range, 105 months, because Moore "did not appear to have any insight into the possibility of changing his lifestyle" and "did not indicate any remorse." (PSR at 44.)

Moore and his counsel did not file any objections to the Presentence Report. (PSR at 43.)

Sentencing

Judge Rakoff sentenced Moore on June 14, 1999. (Ex. D: 6/14/99 Sentencing Transcript ["S."].) At sentencing, Moore was represented by Manasseh's partner, Robert Hildum. (See, e.g., S. 1-2.) Defense counsel began by acknowledging the accuracy of the Presentence

Report and that the guideline calculation was "basically [what was] negotiated for in the plea agreement." (S. 2-4.)

Judge Rakoff noted that the probation officer had determined that Moore "did not indicate any remorse for the instant offense which might cast in jeopardy his two-level downward departure for acceptance of responsibility but certainly doesn't commend itself to a lower sentence within the range." (S. 6.)

Defense counsel responded with respect to the two-level reduction for acceptance of responsibility, as follows:

> The court has before it a sentencing range of 92 to 115 months and it is a level 26, category 4 in the sentencing guidelines. I don't dispute that that is where it should be.
>
> However, in terms of the timing of this plea, the government and defense counsel have been going back and forth negotiating a trial date and then determining whether there would be a trial or not.
>
> In January, I believe it was January 22, the plea offer was tendered for the first time from the government. Mr. Moore, at that time, it was a Friday, had hesitated taking it. Phone conversations were taking place between counsel and Mr. Moore and the government was informed by Mr. Moore's counsel that he couldn't make up his mind and that he wouldn't accept it.
>
> I think, your Honor, and I would respectfully submit that, and my partner handled this, that that was the ethical thing for my partner to do. He could have easily said, yes, we will be there Tuesday, we will take it and then if he rejected it on Tuesday it wouldn't have cost him anything at all, but he didn't.
>
> On Monday my partner was up here, talked to Mr. Moore and at that point he accepted it. The government, and I don't dispute the government's right to do this, the government said at this point we prepared through the lengthy -- in lengthy transcripts and I know because I was preparing myself, your Honor, so they said, well, we will do the plea but you will only get two points off.
>
> My point in saying that is that had there been another point, the sentencing range would have been 84 to 105 months which would have put 92 months right in the middle.

(S. 7-8.) Judge Rakoff responded that the Government was adhering to its "standard position" and that Moore "has to live with the consequences of his choices." (S. 8.) While questioning whether Moore showed a "genuine acceptance of responsibility," Judge Rakoff said he would "accept the two points" reduction for acceptance of responsibility. (S. 9.)

Defense counsel also argued that Moore's role in the conspiracy was a minor one:

> [B]ecause of the plea we are prohibited from arguing a reduction in the guidelines because of the role in the offense but I would respectfully point out to the court that this was a vast conspiracy between New York and Baltimore and Mr. Moore was basically a minor participant in that conspiracy.
>
> He certainly - and this is, of course, undisputed from the facts of the presentence and the facts of the case itself, that he was not part of the bigger conspiracy in New York and Baltimore.
>
> He is the only one in Louisiana. He is talking to Chris Rodriguez and I would specifically submit that his role in this bigger conspiracy is extremely limited. Finally, your Honor, Louisiana probation, parole has a hold on him and his parole is likely to be revoked and he will be facing six more years on top of whatever the court gives him.
>
> I am respectfully requesting of the court [that] the court consider the lower range of the guidelines for those reasons.

(S. 11-12.)

When Moore was given an opportunity to be heard, he stated, in toto:

> Good morning, your Honor. I haven't anything prepared to say. All I want to say is I took my responsibility that I did do this crime and I don't know what type of remorse the probation was looking for but I ruined not only my life but my family's life by doing this and I just ask the court to be merciful.

(S. 13.)

Judge Rakoff found that Moore had accepted responsibility for the crime and sentenced Moore to 102 months imprisonment (followed by four years supervised release). (S.

14.) Judge Rakoff informed Moore of his right to appeal and that it was limited by his plea agreement. (S. 16-17.) Moore did not appeal his sentence. (See Gov't Br. at 6.)[4/]

Moore's Present § 2255 Motion

Moore's initial § 2255 petition, dated June 8, 2000, alleges a single claim of ineffective assistance of counsel, that is, that "[c]ounsel's ineffectiveness caused the movant to be denied his (3) level reduction in his base offense level under U.S.S.G. 3E1.1 for acceptance of responsibility." (Pet. ¶ 12(A).)

Moore submitted an "Affirmation in Support of Pending 2255 Motion" dated September 13, 2000 ("9/13/00 Supp. Pet.") that raised two additional ineffective assistance claims, namely, that defense counsel was ineffective for failing to: (1) argue that Moore was entitled to a downward adjustment in base-offense level pursuant to U.S.S.G. § 3B1.2 as a minimal or minor participant in the conspiracy (9/13/00 Supp. Pet. at 2-3), and (2) request a Fatico hearing regarding the amount of drugs and/or challenge the quantity of heroin to which Moore plead guilty (id. at 4-5).

Finally, in another "Affirmation in Support of Pending 2255 Motion" dated October 16, 2000 ("10/16/00 Supp. Pet."), Moore alleged that his indictment was defective because it "did not state an amount or type of drugs Defendants allegedly discussed about trafficking" and thus

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[4/] Moore's co-defendant Christopher Rodriguez plead guilty to being involved in the same conspiracy as Moore pursuant to a plea agreement that stipulated that the offense involved more than five but less than fifteen kilograms of cocaine and more than three but less than ten kilograms of heroin, resulting in a base offense level of 34. (Ex. F: Rodriguez Plea Agreement at 1.)

"allowed conduct not specifically charged in the indictment to increase the movant's base offense level under the U.S.S.G.," in violation of the Supreme Court's Apprendi decision. (Dkt. No. 109: 10/16/00 Supp. Pet. at 4-5.)

ANALYSIS

I. MOORE'S § 2255 PETITION IS TIMELY UNDER THE AEDPA

The Antiterrorism and Effective Death Penalty Act ("AEDPA") requires a § 2255 petition to be brought within one year of when the judgment of conviction became final:

> A 1-year period of limitation shall apply to a motion under this section [§ 2255]. The limitation period shall run from the latest of--
>
> (1) the date on which the judgment of conviction becomes final . . . .

28 U.S.C. § 2255.

While Moore was sentenced on June 16, 1999, judgment was entered on June 23, 1999. (Dkt. No. 86: Judgment.) Pursuant to the Federal Rules of Appellate Procedure, Moore had ten calendar days from entry of judgment to file a notice of appeal. Fed. R. App. P. 4(b)(1), 4(b)(6), 26(a). Moore did not appeal. (Dkt. No. 106: Gov't Br. at 6; see generally Dkt. in 98 Cr. 833.) Thus, Moore's judgment became final ten days after June 23, 1999, that is, on July 6, 1999. E.g., Rodriguez v. United States, 00 Civ. 7112, 2000 WL 1864038 at *1 (S.D.N.Y. Dec. 20, 2000) (Peck, M.J.); Martinez v. United States, 00 Civ. 1214, 2000 WL 863121 at *1 (S.D.N.Y. June 28, 2000).

Moore's initial § 2255 petition is dated June 8, 2000 and was received by the Court's Pro Se Office on June 13, 2000. (Pet. at pp. 1, 6.) Therefore, Moore timely filed his initial petition.

Moore's supplemental pleadings, however, were submitted on September 13, 2000 and October 16, 2000, after the one-year AEDPA statute of limitations had run.[5/]

As the Second Circuit recently determined in Fama v. Commissioner of Corr. Servs., 235 F.3d 804 (2d Cir. 2000):

> Subsection (c) of Rule 15 [of the Federal Rules of Civil Procedure] governs motions to amend where (as here, given the AEDPA) the statute of limitations for the underlying cause of action has already run. That section provides in relevant part: "An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." In determining whether the claim arises out of the same conduct or occurrence, "[t]he pertinent inquiry . . . is whether the original complaint gave the defendant fair notice of the newly alleged claims."

5/ Moore's September 13, 2000 supplemental petition was accompanied by a motion for leave to amend. (Dkt. No. 104.) Technically, since the Government had not yet responded to Moore's petition, he was entitled to amend as of right pursuant to Fed. R. Civ. P. 15(a). See, e.g., Calderon v. United States Dist. Court, 134 F.3d 981, 986 & n.6 (9th Cir.) ("Because the State had not yet filed its 'responsive pleading' at the time [petitioner] sought leave to amend, [petitioner] had the right, in accordance with Rule 15(a), 'to amend [his habeas] pleading once as a matter of course.'"), cert. denied, 525 U.S. 920, 119 S. Ct. 274 (1998); Willis v. Collins, 989 F.2d 187, 189 (5th Cir. 1993); Choice v. Coughlin, 95 Civ. 5295, 1996 WL 97154 at *1 (S.D.N.Y. Mar. 6, 1996) ("Rule 15 of the Federal Rules of Civil Procedure provides that a party may amend a pleading once at any time before a responsive pleading is served. . . . [Petitioner] filed his motion to supplement two months before respondents served their papers opposing the [habeas] petition. Accordingly, I treat [petitioner]'s petition as amended to include his [additional] claim . . . ."). The Court implicitly accepted Moore's 9/13/00 Supp. Pet. (See Dkt. No. 105.) Moore's 10/16/00 Supp. Pet. was not accompanied by a motion seeking leave to amend, but Moore's Traverse Brief (dated 11/29/00) did generally seek leave to amend. The Court grants leave to amend as to both supplemental petitions.

Fama, 235 F.3d at 815 (fn. omitted).[6/]

The Government contends that Moore's supplemental claims are time-barred because they do not relate back to his original petition. (Gov't Br. at 13-14.) Here, as in Fama, the Court will assume arguendo that Moore's supplemental claims relate back to his original petition and hence that amendment is permissible. See Fama v. Commissioner of Corr. Servs., 235 F.3d at 816. The Court does so because, as discussed below, Moore's claims lack merit.

II. MOORE'S ABILITY TO ASSERT A § 2255 PETITION IS BARRED BY HIS PLEA AGREEMENT, EXCEPT AS TO INEFFECTIVE ASSISTANCE OF COUNSEL

In his plea agreement, Moore waived both his right to appeal and to seek post-conviction relief under 28 U.S.C. § 2255 from any sentence which did not exceed the agreed-upon guidelines range. (See Ex. A: Plea Agreement at 4, quoted at page 4 above.) Accordingly, this Court must determine whether such a waiver is generally enforceable and, if so, whether and to what extent it is enforceable in the present case.

"The Second Circuit has not yet directly addressed the validity of a defendant's waiver of his right to file a collateral attack under 28 U.S.C. § 2255." Ocasio v. United States, 99

[6/] Fama dealt with a § 2254 habeas petition. The Second Circuit's analysis, however, relied on opinions from other circuits dealing with § 2255 cases and the Second Circuit stated that "Sections 2254 and 2255 are generally seen as in pari materia. . . . We conclude that, with regard at least to the timeliness of motions for leave to amend, the two statutes remain equivalent . . . ." Fama v. Commissioner of Corr. Servs., 235 F.3d at 815-16; see, e.g., Van de Cruize v. United States, No. 98-CV-3553, 1998 WL 426722 at *1 (E.D.N.Y. June 18, 1998) (applying Rule 15(c)'s relation back doctrine to § 2255 habeas petition); Bilzerian v. United States, 95 Civ. 1215, 1996 WL 524340 at *2-3 (S.D.N.Y. Sept. 13, 1996) (same), aff'd mem, 125 F.3d 843 (2d Cir. 1997).

Civ. 9045, 95 Cr. 942, 2000 WL 460459 at *3 (S.D.N.Y. Apr. 18, 2000).[7/] In a recent "unpublished" opinion, however, a panel of the Second Circuit held that: "We have held that waivers of the right to appeal or collaterally attack a sentence are enforceable as long as the waiver was made knowingly and voluntarily." Pfeiffer v. United States, Nos. 97-2343, 97-2468, 99-2755, 96-2603, 234 F.3d 1262 (table), 2000 WL 1655232 at *2 (2d Cir. Nov. 3, 2000) (Cabranes, Pooler & Katzmann, C.J.). Under the Second Circuit's rules, an "unpublished" decision is not to be cited for precedential value. See 2d Cir. R. 0.23 (summary opinions "shall not be cited or otherwise used in unrelated cases before this or any other court"). The Court therefore looks to the Second Circuit's published analysis of plea agreement waivers of the right to direct appeal for guidance.

The Second Circuit has upheld plea agreement waivers of the right to direct appeal. See, e.g., United States v. Djelevic, 161 F.3d 104, 106-07 (2d Cir. 1998) ("It is by now

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[7/] Accord, e.g., Balbuena v. United States, 104 F. Supp. 2d 218, 219 (S.D.N.Y. 2000) ("The question of the validity – or scope thereof – of a defendant's waiver of her right to file a collateral attack has not yet been addressed directly by the Second Circuit."); Luna v. United States, 98 Civ. 7970, 96 Cr. 505, 1999 WL 767420 at *3 (S.D.N.Y. Sept. 28, 1999) ("The Second Circuit has not explicitly held that a waiver of § 2255 rights in a plea agreement is enforceable."); Ramirez v. United States, 963 F. Supp. 329, 331 (S.D.N.Y. 1997) (The Second Circuit "has yet to hold on the question of the validity of a § 2255 waiver as a direct bar to a petition addressing the issues purportedly waived."); see United States v. Pipitone, 67 F.3d 34, 39 (2d Cir. 1995) (where plea agreement contained waiver of right to appeal sentence within agreed range, defendant could not avoid effect of that agreement by bringing § 2255 petition).

well-settled that a defendant's knowing and voluntary waiver of his right to appeal a sentence within an agreed upon guideline range is enforceable.").[8/]

"[N]umerous district court decisions [within the Second Circuit] have upheld the validity of a plea agreement waiver of the right to litigate under § 2255." Luna v. United States, 1999 WL 767420 at *3 n.1 (citing cases); see also, e.g., Sanders v. United States, 00 Civ. 5528, 2001 WL 91634 at *1 (S.D.N.Y. Feb. 2, 2001) ("A defendant's knowing and voluntary waiver of his right to appeal or collaterally attack a sentence in a stipulated Guideline range is binding.") (citing, inter alia, Pfeiffer); Valdez v. United States, 00 Civ. 9105, 2001 WL 29998 at *1 (S.D.N.Y. Jan. 8, 2001); Psihountas v. United States, 98 Civ. 7066, 2000 WL 739548 at *2 (S.D.N.Y. June 8, 2000); Gumbs v. United States, 8 F. Supp. 2d 882, 883 (S.D.N.Y. 1998) (A waiver of § 2255 rights in a plea agreement "is not contrary to public policy and does not result in manifest unfairness or a miscarriage of justice. As a result, the waiver is enforceable . . . ."); United States v. Montague, 5 F. Supp. 2d 205, 205 (S.D.N.Y. 1998); Ramirez v. United States, 963 F. Supp. at 330-32; Trujillo v. United States, 92 Civ. 6791, 91 Cr. 575, 1993 WL 227701 at *3 (S.D.N.Y.

[8/] See also, e.g., United States v. Yemitan, 70 F.3d 746, 747-48 (2d Cir. 1995); United States v. Salcido-Contreras, 990 F.2d 51, 51 53 (2d Cir.) ("We have held that knowing and voluntary waivers of a defendant's right to appeal a sentence within an agreed guidelines range are enforceable. . . . In no circumstance, however, may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless."), cert. denied, 509 U.S. 931, 113 S. Ct. 3060 (1993); United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992).

June 21, 1993). This Court has found no decision within the Second Circuit rejecting the general validity of a § 2255 waiver in a plea agreement. Moreover, the other circuit courts that have decided the issue also have upheld the general validity of § 2255 waivers in plea agreements. See, e.g., United States v. Cockerham, 237 F.3d 1179, 1183 (10th Cir. 2001); DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000); Mason v. United States, 211 F.3d 1065, 1069 (7th Cir. 2000), cert. denied, 121 S. Ct. 1148 (2001); Watson v. United States, 165 F.3d 486, 488-89 (6th Cir. 1999); United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir.), cert. denied, 508 U.S. 979, 113 S. Ct. 2980 (1993).

This Court sees no "principled means of distinguishing [a § 2255] waiver from the waiver of a right to appeal." United States v. Wilkes, 20 F.3d at 653 (upholding plea agreement waiver of right to bring § 2255 petition). Accordingly, this Court joins all of the other district court decisions in this Circuit, the decisions of other Circuit courts, and the unpublished Second Circuit decision, and holds that § 2255 waivers are generally enforceable.

Determining that plea agreement waivers of § 2255 rights are generally enforceable does not, however, end the inquiry. In connection with plea agreement waivers of the right to direct appeal, the Second Circuit has suggested that a defendant's claim of "ineffective assistance of counsel in entering the plea agreement" would "cast doubt on the validity of his waiver." United States v. Djelevic, 161 F.3d at 107; see also, e.g., United States v. Hernandez, No. 00-1317, 2001 WL 227863 at *3 (2d Cir. Mar. 8, 2001); United States v. DeJesus, 219 F.3d 117, 121-23 (2d Cir.), cert. denied, 121 S. Ct. 502 (2000); United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997). Accordingly, "a number of district courts within this circuit have held that a Section 2255 petitioner should not be deemed to have waived the right to

challenge his sentence where the ground for attack is ineffective assistance of counsel . . . . " Balbuena v. United States, 104 F. Supp. 2d at 220; see also, e.g., Sanders v. United States, 2001 WL 91634 at *1; Ocasio v. United States, 2000 WL 460459 at *3; Luna v. United States, 1999 WL 767420 at *4-5; Ramos v. United States, 97 Civ. 2572, 1998 WL 230935 at *2 (S.D.N.Y. May 8, 1998); Ramirez v. United States, 963 F. Supp. at 332.[9/]

The Court agrees with these cases and holds that a claim of ineffective assistance in connection with the plea negotiation is not waived by a § 2255 plea agreement waiver.

Moore's original and supplemental § 2255 petitions allege that his counsel was ineffective. (Pet. ¶ 12(A); 6/8/00 Moore Br. at 2-7; 9/13/00 Supp. Pet.; Dkt. No. 117: 11/29/00 Moore Traverse Br.) The Court therefore must review these claims to see whether they are barred by the § 2255 plea agreement waiver and, if not, whether they provide a basis for relief.

III. MOORE'S CLAIMS OF INEFFECTIVE ASSISTANCE IN CONNECTION WITH HIS GUILTY PLEA ARE WITHOUT MERIT

[9/] See also, e.g., Cockerham v. United States, 237 F.3d at1183 ("We are persuaded by the Seventh Circuit's determination that 'a claim of ineffective assistance of counsel in connection with the negotiation of a plea agreement cannot be barred by the agreement itself.' . . . It is altogether inconceivable to hold such a waiver enforceable when it would deprive a defendant of the 'opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.'") (quoting Jones); DeRoo v. United States, 223 F.3d at 923-24; Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999) (in allowing ineffective assistance claim to serve as basis for challenging a § 2255 waiver, held that: "Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a [plea] agreement cannot be barred by the agreement itself – the very product of the alleged ineffectiveness."); Leonardo v. United States, 00 Civ. 5526, 2000 WL 1449869 at *1 (S.D.N.Y. Sept. 28, 2000) (assumes arguendo that "relief might be available under Section 2255 even to a defendant who entered into [an explicit § 2255] waiver in a plea agreement upon a sufficient showing that the plea agreement was infected by the consequences of ineffective assistance of counsel in connection with the plea negotiations").

Moore makes several claims of ineffectiveness in connection with the negotiation and entry of his guilty plea. First, he contends that he was prevented from pleading guilty in a timely manner (and thus receiving an additional point decrease in offense level) by counsel's failure to relay an earlier plea offer from the government, counsel's failure to seek a plea offer from the government until Moore paid the balance of counsel's fee, and counsel's inadequate advice in connection with the government's "twenty-four hour" plea offer tendered on January 22, 1999.[10/] (Pet ¶ 12(A); 6/8/00 Moore Br. at 2-6; 6/8/00 Moore Aff. ¶¶ 6-11; Dkt. No. 117: 11/29/00 Moore Traverse Br. at 3-10.) Second, Moore claims that his counsel was ineffective for failing to negotiate for a downward adjustment in base-offense level on the ground that Moore was a minimal or minor participant in the conspiracy. (See, e.g., 9/13/00 Supp. Pet. at 2-4; 11/29/00 Moore Traverse Br. at 10-14.) Finally, Moore contends that his attorney's failure to request a Fatico hearing caused him to plead guilty to a greater amount of drugs than he was responsible for. (See, e.g., 9/13/00 Supp. Pet. at 4-5.)

[10/] On Friday January 22, 1999 or Thursday January 21, 1999 -- immediately after the January 21, 1999 guilty pleas entered by Moore's two codefendants (Dkt. entries 1/21/99; see also Dkt. Nos. 78, 84, 85) -- the Government made a plea offer to Moore "which required that Mr. Moore accept it within 24 hours." (Manasseh 11/9/00 Aff. ¶ 6; see also 6/8/00 Moore Br. at 3.) Moore rejected the offer, but after the weekend changed his mind and decided he wanted to plead guilty. (Manasseh 11/9/00 Aff. ¶ 6.) The "Government agreed to allow Mr. Moore to plead to the same offer, however, as the Government had begun to prepare for trial, it refused to give to Mr. Moore an extra point off pursuant to Sentencing Guidelines § 3E1.1." (Manasseh 11/9/00 Aff. ¶ 6.)

Under the familiar Strickland v. Washington standard, in order to prevail on an ineffective assistance of counsel claim, a petitioner must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) prejudice, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370 (1985) (applying Strickland standard to ineffective assistance claim arising out of the plea process); Gauthier v. United States, No. Civ. A. 98-CV-630, 1998 WL 808997 at *3 (N.D.N.Y. Nov. 18 1998) (Pooler D.J.) (same); Polanco v. United States, 98 Civ. 592, 1998 WL 512957 at *4 (S.D.N.Y. Aug. 17, 1998) (Sotomayor, D.J.) (same); Singh v. Kuhlmann, 94 Civ. 2213, 1995 WL 870113 at *8 (S.D.N.Y. Aug. 25, 1995) (Peck, M.J.) (same), report & rec. adopted, 1996 WL 337283 (S.D.N.Y. June 19, 1996) (Cote, D.J.).[11/] In the context of a guilty plea, the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going

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[11/] See also, e.g., Fluellen v. Walker, 97 Civ. 3189, 2000 WL 684275 at *11 (S.D.N.Y.. May 25, 2000); Dukes v. McGinnis, 99 Civ. 9731, 2000 WL 382059 at *8 (S.D.N.Y. Apr. 17, 2000) (Peck, M.J.); Yeung v. Artuz, 97 Civ. 3288, 2000 WL 145103 at *7 (S.D.N.Y. Feb. 3, 2000) (Peck, M.J.); Cruz v. Greiner, 98 Civ. 7939, 1999 WL 1043961 at *15-16 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.); Lugo v. Kuhlmann, 68 F. Supp. 2d 347, 370 (S.D.N.Y. Oct. 7, 1999) (Patterson, D.J. & Peck, M.J.); Santos v. Greiner, 99 Civ. 1545, 1999 WL 756473 at *7 (S.D.N.Y. Sept. 24, 1999) (Peck, M.J.); Avincola v. Stinson, 60 F. Supp. 2d 133, 146-47 (S.D.N.Y. 1999) (Scheindlin, D.J. & Peck, M.J.); Franza v. Stinson, 58 F. Supp. 2d 124, 133-34 (S.D.N.Y. 1999) (Kaplan, D.J. & Peck, M.J.); Tapia-Garcia v. United States, 53 F. Supp. 2d 370, 380 (S.D.N.Y. 1999) (Baer, D.J. & Peck, M.J.).

to trial." Hill v. Lockhart, 474 U.S. at 59, 106 S. Ct. at 370; see also, e.g., Tapia-Garcia v. United States, 53 F. Supp. 2d at 380; Singh v. Kuhlmann, 1995 WL 870113 at *8.[12/]

When the petitioner fails to demonstrate sufficient prejudice, the Court need not examine the question of whether counsel rendered reasonably effective assistance. See, e.g., Strickland v. Washington, 466 U.S. at 697, 104 S. Ct. at 2069 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,

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[12/] The Strickland standard applies to Moore's ineffectiveness claim that his attorney had a conflict of interest because Moore had not paid his entire fee. (See 6/8/00 Moore Br. at 5-6.) As Judge Sotomayor has explained:

> The existence of a fee dispute between a defendant and his attorney, even one that has escalated to the point of a lawsuit by the attorney to recover his fees, does not create an actual conflict of interest which brings an ineffective assistance claim under the Cuyler standard [which does not require a showing of prejudice]. See [United States v.] O'Neil 118 F.3d [65,] 71-72 [(2d Cir. 1997)]. To the extent that the attorney shirks his ethical obligation to dutifully represent his client as a result of a fee dispute, . . . Strickland provides the appropriate analytic framework. Id. at 72.

Narvaez v. United States, 97 Civ. 8745, 1998 WL 255429 at *3 (S.D.N.Y. May 19, 1998) (Sotomayor, D.J.).

which we expect will often be so, that course should be followed."); Fluellen v. Walker, 2000 WL 684275 at *11.[13/]

[13/] See also, e.g., Dukes v. McGinnis, 2000 WL 382059 at *8; Yeung v. Artuz, 2000 WL 145103 at *8; Cruz v. Greiner, 1999 WL 1043961 at *16; Lugo v. Kuhlmann, 68 F. Supp. 2d at 371; Santos v. Greiner, 1999 WL 756473 at *8; Avincola v. Stinson, 60 F. Supp. 2d at 147; Franza v. Stinson, 58 F. Supp. at 134; Tapia-Garcia v. United States, 53 F. Supp. 2d at 381.

A. Moore's Allegations that Counsel's Ineffectiveness Prevented Him from Pleading Guilty in a Timely Manner Are Without Merit

Moore claims that "[i]t is because of counsel that [he] did not plead guilty in a timely manner," thereby forgoing a one-point reduction, pursuant to U.S.S.G. § 3E1.1(b),[14/] for timely acceptance of responsibility. (6/8/00 Moore Aff. ¶ 11; see also, e.g., Pet ¶ 12(A); 6/8/00 Moore Br. at 2-6; Dkt. No. 117: 11/29/00 Moore Traverse Br. at 3-10.) Specifically, Moore alleges that he did not plead guilty in a timely manner as a result of counsel's (1) failure to relay an earlier plea offer from the government; (2) failure to seek a plea offer from the Government until Moore paid the balance of counsel's fee; and (3) inadequate advice concerning the strength

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[14/] U.S.S.G. § 3E1.1 provides as follows:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
>
> . . . .
>
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level.

of Moore's case when the twenty-four hour offer was communicated to him. (See, e.g., 6/8/00 Moore Br. at 2-6; 11/29/00 Moore Traverse Br. at 3-10.)

Moore's claims are without merit.

As for defense counsel's alleged failure to relay an earlier plea offer from the Government, Moore has come forward with no admissible evidence that any such offer existed. The fact that, according to Moore, his co-defendants were given earlier plea offers of ten to eleven years (see, e.g., 6/8/00 Moore Aff. ¶ 6; 6/8/00 Moore Br. at 2; 11/29/00 Moore Traverse Br. at 9) does not mean that the Government made any plea offer to Moore. First, Moore's evidence -- that co-defendant Lee told him that Lee and Rodriguez received such an offer -- is hearsay and not admissible. See, e.g., Hayden v. United States, 814 F.2d 888, 892 (2d Cir. 1987); United States v. Aiello, 814 F.2d 109, 113-14 (2d Cir. 1987) (to warrant further consideration, § 2255 petition "must contain assertions of fact that a petitioner is in a position to establish by competent evidence. . . . [H]earsay statements will not suffice because none of these would be admissible evidence at a hearing."); Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974) ("Mere generalities or hearsay statements will not normally entitle the [§ 2255] applicant to a[n evidentiary] hearing . . . since such hearsay would be inadmissible at the hearing itself."). The Court has grave doubts that Moore's co-defendants received such an offer, since the record shows that Rodriguez's plea agreement called for a stipulated guideline range of 135 to 168 months (Ex. F: Rodriguez Plea Agreement at 2), much greater than the 120 to 132 months of the offer to which Moore refers. Rodriguez was sentenced to 135 months and Lee sentenced to 140 months imprisonment, respectively. (Dkt. Nos. 87, 90.) Second, even if Moore's co-defendants received such offers from the Government, that is no evidence that the Government made such

an offer as to Moore. Indeed, the main Assistant United States Attorney involved in the case at that time testified unequivocally that "[n]o one from the Government informed Moore's co-defendants, Christopher Rodriguez and Darren Lee, of any plea offer that was made to Moore or Moore's attorneys." (Ex. E: 10/12/00 Aff. of A.U.S.A. Cheryl Krause ¶ 4.) Third, even if a ten to eleven year (i.e., 120 to 132 months) offer was made to Moore, it would have been less beneficial to Moore than the 92 to 115 months deal pursuant to which Moore plead guilty. (Ex. A: Plea Agreement at 3.)

Finally, and most importantly, both Government counsel and defense counsel have sworn that there was no earlier offer made to Moore. The main Assistant U.S. Attorney involved in the case testified that "[n]o specific plea offer was made by the Government to Moore or his attorneys in January 1999 other than the one communicated to his attorney during the last two weeks of January 1999." (Ex. E: 10/12/00 Aff. of A.U.S.A. Cheryl Krause ¶ 3.)

As for counsel's alleged failure to timely seek a plea offer from the Government, Moore has failed to establish prejudice as there is no evidence that the Government would have made an offer prior to January 22, 1999, or, for that matter, that Moore would have accepted an offer had defense counsel been successful in securing one. Indeed, Moore's attorney submitted an affidavit that "[u]ntil shortly before he plead guilty in January 1999, Mr. Moore made it abundantly clear that he was not interested in cooperating or pleading guilty." (Manasseh 11/9/00 Aff. ¶ 3.) When Rodriguez plead guilty -- which was on January 21, 1999 (Dkt. entry for 1/21/99; see also Dkt. Nos. 78, 85) -- Moore's counsel advised Moore that Rodriguez might testify against Moore and explained that their taped conversations, in code, involved drug transactions. (Manasseh 11/9/00 Aff. ¶ 5.) Moore's counsel testified that "as a result" of that conversation:

> Mr. Moore changed his mind and wanted me to find out about a possible plea offer. I immediately informed the Government that Mr. Moore wanted a plea offer. The Government quickly made a plea offer which required that Mr. Moore accept it within 24 hours. I immediately relayed the offer to Mr. Moore. We had substantial discussions regarding the plea offer. Ultimately Mr. Moore refused to accept it.

(Manasseh 11/9/00 Aff. ¶¶ 5-6.) Thus, the undisputed evidence is that as soon as Moore indicated any interest in exploring a plea, his attorney approached the Government for an offer, which Moore then rejected. Indeed, Moore concedes that he did not consider taking a guilty plea until January 25, one day before he formally plead guilty. (Moore 11/29/00 Traverse Aff. ¶ 4.) Moore thus can show no prejudice.

Finally, Moore's claim that he was given inadequate advice in connection with the twenty-four hour offer communicated to him on Friday, January 22, 2000, is contradicted by Moore's sworn statement at his plea proceeding that he was satisfied with his counsel's representation. (Plea Tr. 5, quoted at page 5 above.) Moore's claim that counsel's inadequate advice regarding the case's strength resulted in him forgoing the January 22 plea and losing the extra one-point reduction for acceptance of responsibility was known to Moore at the time of his plea allocution when he stated, under oath, that he was satisfied with his counsel's representation. (Id.) As the Supreme Court has noted, statements made at a plea allocution "carry a strong

presumption of verity" and "constitute a formidable barrier in any subsequent collateral proceeding." Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629 (1977); accord, e.g., Foreman v. Garvin, 99 Civ. 9078, 2000 WL 631397 at *11 (S.D.N.Y. May 16, 2000) (Peck, M.J.); Marcelin v. Garvin, 97 Civ. 2996, 1999 WL 977221 at *7 (S.D.N.Y. Oct. 26, 1999) (Peck, M.J.) (quoting Blackledge); Singh v. Kuhlmann, 94 Civ. 2213, 1995 WL 870113 at *7 (S.D.N.Y. Aug. 25, 1995) (Peck M.J.) (same), report & rec. adopted, 1996 WL 337283 (S.D.N.Y. June 19, 1996) (Cote, D.J.); see also, e.g., Adames v. United States, 171 F.3d 728, 732-33 (2d Cir. 1999) (statements at plea allocution "'carry a strong presumption of verity' . . . and are generally treated as conclusive in the face of the defendant's later attempt to contradict them," citing cases); United States v. Torres, 129 F.3d 710, 715 (2d Cir. 1997) ("A defendant's bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea."); United States v. Gonzalez, 970 F.2d 1095, 1100-01 (2d Cir. 1992); Panuccio v. Kelly, 927 F.2d 106, 110-11 (2d Cir. 1991); Santobello v. United States, 94 Cr. 119, 97 Civ. 4404, 1998 WL 113950 at *2-3 (S.D.N.Y. March 13, 1998); United States v. Caesar, 94 Cr. 59, 1995 WL 312443

at *3 (S.D.N.Y. May 23,1995) ("The Court notes that statements made during a plea allocution carry a strong presumption of verity. Such statements are conclusive absent credible reason justifying departure from their apparent truth.") (citations and internal quotation marks omitted); United States v. Napolitano, 212 F. Supp. 743, 747 (S.D.N.Y. 1963) (Weinfeld, D.J.) ("The defendant's admissions . . . [at guilty plea] are solemn declarations; they are not to be lightly disregarded in favor of his present self-serving assertion . . . ."). Given the strong presumption of verity accorded statements made at guilty plea proceedings, this Court sees no reason to credit Moore's current self-serving statements over his statement at his plea allocution that he was satisfied with counsel's representation.

B. Moore's Allegation that Counsel Was Ineffective for Failing to Negotiate a Minimal or Minor Role Adjustment Lacks Merit

Moore claims that defense counsel was ineffective for failing to negotiate a downward adjustment in base-offense level, under U.S.S.G. § 3B1.2, on the ground that Moore was a minimal or minor participant in the conspiracy. (See, e.g., 9/13/00 Supp. Pet. at 2-4; 11/29/00 Moore Br. at 10-13.) Moore argues that "the fact that [he] lived in Louisiana and the conspiracy was centered in New York . . . suggest[s] his involvement, knowledge, and culpability

may have been significantly less than any other co-conspirators" and, given that "his conviction was solely based on wiretaps and one transaction," his "involvement may have classified him as the least culpable of those involved in the conspiracy." (9/13/00 Supp. Pet. at 3-4.)

This claim also appears to be factually foreclosed by Moore's sworn statement during his plea allocution that he understood his plea agreement and was satisfied with counsel's representation. (Plea Tr. 5, 10-13, quoted at pages 5-7 above; see cases discussed at pages 26-27 above.) Even if this claim is to be considered, however, it lacks merit.

Section 3B1.2 of the Sentencing Guidelines provides that a defendant's base offense level may be reduced by four levels if the defendant was "a minimal participant in any criminal activity," reduced by two levels if the defendant "was a minor participant in any criminal activity." U.S.S.G. § 3B1.2. The Guidelines' Commentary states that "[i]t is intended that the downward adjustment for a minimal participant will be used infrequently" and is intended for "defendants who are plainly among the least culpable of those involved in the conduct of the group." U.S.S.G. § 3B1.2 (Application Notes 1-2). The Commentary defines a "minor participant" as "any participant who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2 (Application Note 3). The Background Commentary to Section 3B1.2 makes clear that an adjustment under that section is appropriate only for a defendant whose role makes him "substantially less culpable than the average participant." U.S.S.G. § 3B1.2 (Background Note).

A defendant seeking a downward adjustment under § 3B1.2 for a minor or minimal role bears "the burden of establishing 'by a preponderance of the evidence that he or she is entitled to a reduction due to his or her reduced level of culpability.'" United States v. LaValley,

999 F.2d 663, 665 (2d Cir. 1993) (quoting United States v. Soto, 959 F.2d 1181, 1187 (2d Cir. 1992)).[15/] "[T]he district judge 'is not bound to accept a defendant's own declarations, made with the purpose of reducing his sentence, about the circumstances of his crime.'" United States v. Lopez, 937 F.2d 716, 727 (2d Cir. 1991). A sentencing judge's analysis of the defendant's role in criminal activity is highly fact-specific and "depends upon 'the nature of the defendant's relationship to the other participants, the importance of the defendant's action to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise.'" United States v. Idowu, 74 F.3d at 397; accord, e.g., United States v. Shonubi, 998 F.2d 84, 90 (2d Cir. 1993).

As "[t]he intent of the Guidelines is not to 'reward' a guilty defendant with an adjustment merely because his coconspirators were even more culpable," the "defendant's role in the offense is determined 'not only by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable, . . . but also by measuring each participant's individual acts and relative culpability against the elements of the offense of conviction.'" United States v. Lopez, 937 F.2d at 728; accord, e.g., United States v. Pena, 33 F.3d 2, 3 (2d Cir. 1994). The Second Circuit "has made clear that 'the Sentencing Commission intends for culpability to be gauged relative to the elements of the offense of conviction, not simply relative to co-perpetrators.'" United States v. Ajmal, 67 F.3d 12, 18 (2d Cir. 1995).[16/]

[15/] Accord, e.g., United States v. Idowu, 74 F.3d 387, 397 (2d Cir.), cert. denied, 517 U.S. 1239, 116 S. Ct. 1888 (1996); United States v. Sasso, 59 F.3d 341, 353 (2d Cir. 1995); United States v. Garcia, 920 F.2d 153, 156 (2d Cir. 1990).

[16/] See also, e.g., United States v. Neils, 156 F.3d 382, 383 (2d Cir. 1998); United States v. Shonubi, 998 F.2d at 90; United States v. Lopez, 937 F.2d at 728; U.S.S.G. § 3B1.2 (continued...)

Here, although the overall conspiracy involved between five and fifteen kilograms of cocaine and between three and ten kilograms of heroin (see, e.g., Ex. F: Rodriguez Plea Agreement at 1), Moore was allowed to plead guilty to conspiracy to distribute between 400 and 700 grams of heroin (see, e.g., Ex. B: Plea Tr. 16; Ex. A: Plea Agreement at 2). Thus, even assuming that Moore played a minor role with respect to the overall conspiracy, since Moore was not held accountable for the substantial amounts of narcotics involved with the overall conspiracy, he was not entitled to a role adjustment. See, e.g., United States v. Finkelstein, 229 F.3d 90, 97-98 (2d Cir. 2000) (defendant who plead guilty to laundering $20 million out of the $500 million laundered by coconspirators was not entitled to role reduction since defendant's "personal involvement in less than the total amount laundered by the coconspirators was factored into his sentence in connection with the calculation of his offense level" and defendant could not demonstrate that he played a minor role in relation to the money he personally laundered); United States v. Lewis, 93 F.3d 1075, 1085 (2d Cir. 1996) (tax evader held accountable for just his portion of false deductions rather than entire amount of false deductions from twenty other participants in tax conspiracy was not entitled to role reduction since his "base offense level was calculated on the basis of his limited role and not his role in the entire [tax evasion] conspiracy"); United States v. Gomez, 31 F.3d 28, 31 (2d Cir. 1994) (minor

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[16/](...continued)
(Background Note).

role reduction inappropriate where defendant's offense level was calculated based solely upon drug sales defendant was involved with and not upon the much larger amount involved in the entire drug diversion scheme).[17/]

The Court notes that if Moore had been held accountable for the full amount of narcotics in the conspiracy, i.e., 5 to 15 kilograms of cocaine and 3 to 10 kilograms of heroin (see Ex. F: Rodriguez Plea Agreement at 1), his offense level would have been increased by six points (compare U.S.S.G. §§ 2D1.1(a)(3) (offense level 34 for 3-10 kilograms of heroin) with Ex. A: Plea Agreement at 2 (offense level of 28, based on U.S.S.G. § 2D1.1(c)(6), 400-700 grams of heroin)), but, at most, he could have received a four point reduction pursuant to Section 3B1.2(b).

Moore's counsel explained to Moore that "given that the Government had allowed Mr. Moore to plead to a lower amount of narcotics than was involved in the overall conspiracy, I did not think Mr. Moore qualified for a role adjustment. I had discussions with Mr. Moore about this prior to his sentencing." (Manasseh 11/9/00 Aff. ¶ 10.) This advice was not ineffective assistance but a correct understanding of the case law cited above.

[17/] See also, e.g., United States v. Rodriguez de Varon, 175 F.3d 930, 943-44 (11th Cir.) ("in determining a defendant's role in the offense, a district court must measure the defendant's role against the relevant conduct attributed to her in calculating her base offense level. . . . Only if the defendant can establish that she played a relatively minor role in the conduct for which she has already been held accountable – not a minor role in any larger criminal conspiracy – should the district court grant downward departure adjustment for minor role in the offense."), cert. denied, 528 U.S. 976, 120 S. Ct. 424 (1999); United States v. Burnett, 66 F.3d 137, 140 (7th Cir. 1995) (Easterbrook, C.J.) (upholding denial of two-point adjustment because Guidelines require consideration of defendant's conduct in relation to conduct for which he was convicted; "[w]hen a courier is held accountable for only the amount he carries, he plays a significant rather than a minor role in that offense").

C. Moore's Allegation that Counsel was Ineffective for Failing to Request a Fatico Hearing Lacks Merit

Moore alleges that "[c]ounsel's failure to file a motion for a Fatico Hearing caused [Moore] to plea out to amounts he wasn't totally responsible for." (9/13/00 Supp. Pet. at 5.)[18/] Specifically, Moore contends that he "told his attorney that he was only responsible for 350 grams of heroin; not the calculation of 450 grams the government came up with." (Id. at 4.)

This Court agrees with the Tenth Circuit's holding that "a plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver. Collateral attacks based on ineffective assistance of counsel claims that are characterized as falling outside that category are waivable." United States v. Cockerham, 237 F.3d 1179, 1187 (10th Cir. 2000). Counsel's alleged failure to seek a Fatico hearing is not an ineffective assistance claim that relates to the validity of Moore's plea or the waiver itself. Moore knew the plea's sentencing guideline calculation and the drug amount on which it was based. (Ex. A: Plea Agreement at 2; Ex. B: Plea Tr. at 5-7, 10-13, 16; see also Manasseh 11/9/00 Aff. ¶ 10.)

But even if this claim survived the § 2255 waiver, it must fail. While Moore now claims he only was responsible for 300 grams of heroin, at his plea allocution he conceded that he was involved in "additional transactions that exceeded 400 grams." (Ex. B: Plea Tr. 16.) As discussed above, admissions during the plea allocution "carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629 (1973); see also cases cited at pages

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18/ "A 'Fatico' hearing is a sentencing hearing at which the prosecution and the defense may introduce evidence relating to the appropriate sentence." United States v. Lohan, 945 F.2d 1214, 1216 (2d Cir. 1991); see United States v. Fatico, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073, 100 S. Ct. 1018 (1980).

26-27 above. This Court is justified in crediting Moore's statements at his plea allocution that he was involved in transactions involving at least 400 grams of heroin over his later self-serving allegations that he was responsible for only 350 grams of heroin. As there is no credible evidence that there would have been any factual basis to challenge the amount of heroin attributed to Moore in his plea agreement, Moore's counsel's failure to request a Fatico hearing did not constitute ineffective assistance.[19/]

IV. MOORE'S INEFFECTIVE ASSISTANCE CLAIMS RELATING TO SENTENCING HAVE BEEN WAIVED AND, IN ANY EVENT, ARE WITHOUT MERIT

Moore raises several claims relating to counsel's performance at sentencing. Specifically, Moore argues that counsel was ineffective for failing at sentencing to: (1) explain why Moore failed to timely enter his guilty plea; (2) argue for a minimal role adjustment; and (3) challenge the quantity of drugs for which Moore was held accountable in his plea agreement. (See, e.g., 6/8/00 Moore Br. at 6; 9/13/00 Supp Pet. at 4-5; Dkt. No. 117: 11/29/00 Moore Traverse Br. at 10-14.)

As discussed at pages 16-18 above, waivers of the right to seek § 2255 relief are generally enforceable. While ineffectiveness claims relating to counsel's performance in the

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[19/] Indeed, there is evidence in the record that if counsel had requested a Fatico hearing, Moore could have been held accountable for a larger quantity of drugs than he plead guilty to. (See Manasseh 11/9/00 Aff. ¶ 10: "Prior to sentencing I learned that the Government could have proved that Moore's relevant conduct involved more narcotics than what was agreed to in the plea agreement Mr. Moore entered into with the Government.")

negotiation and entry of the plea survive a waiver on the ground that these claims go to the knowing and voluntary nature of the plea (see discussion at pages 18-19 above), there is no similar rationale for not upholding § 2255 waivers in the face of ineffectiveness claims regarding counsel's performance at sentencing. Accordingly, courts have generally enforced explicit § 2255 waivers in the face of claims alleging ineffectiveness with respect to sentencing. See, e.g., United States v. Cockerham, 237 F.3d 1179, 1183-87 (10th Cir. 2001) & cases cited therein.[20/] This Court adopts the reasoning of those courts that have held that ineffectiveness claims relating to sentencing generally do not survive a § 2255 waiver. Therefore, because (1) this Court has already found that Moore's claims of ineffectiveness with respect to his counsel's negotiation and entry of the plea are without merit, (2) Moore has not alleged any other basis for invalidating his § 2255 waiver, and (3) his sentence of 102 months was within the stipulated guidelines range of 92 to 105 months, Moore's claims relating to his attorney's performance at sentencing have been waived.

In any event, even if Moore's claims relating to his counsel's performance at sentencing had not been waived, they are without merit since (1) Moore has failed to establish a

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[20/] But see United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994) ("a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations" including the Sixth Amendment right to effective assistance of counsel), cert. denied, 514 U.S. 1107, 115 S. Ct. 1957 (1995); United States v. Teshima-Jimenez, No. Crim. 97-087, 1999 WL 600326 at *3 (E.D. La. Aug. 5, 1999) (reviewing merits of defendant's ineffective assistance claims based on counsel's failure to object to presentence report and failure to obtain downward departure despite waiver because ineffective assistance claim "is clearly constitutional in nature"); United States v. Kiefer, No. Crim. A. 96-279, C.A. 98-536, 1998 WL 388592 at *2 (E.D. La. July 9, 1998) (addressing merits of ineffective assistance claim based on counsel's failure to object to presentence report despite waiver of § 2255 rights).

factual basis for any of the arguments he now claims should have been made at sentencing, and (2) by the time of sentencing, the issues were factually precluded by Moore's plea agreement (e.g., that he would not argue for a sentence below the agreed guideline range, Plea Agreement at 4) or by his guilty plea allocution (e.g., re drug quantity). See Point III above.

V. MOORE'S CHALLENGES TO HIS INDICTMENT ARE WAIVED, AND IN ANY EVENT ARE MERITLESS

Moore claims that his indictment was in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and unconstitutionally vague because it did not allege a specific a quantity or type of drugs. (See Dkt. No. 109: 10/16/00 Supp. Pet.)

For the reasons discussed above, this claim does not survive the § 2255 waiver in the plea agreement. (See pages 16-19 above.) Out of an excess of caution, however, since the Supreme Court decided Apprendi after Moore's plea and sentence, the Court will address Moore's Apprendi claim on the merits.

In Apprendi, the Supreme Court held that under the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Apprendi v. New Jersey, 120 S. Ct. at 2355; see also id. at 2362-63. Moore was sentenced to 102 months, which is within the statutory maximum of twenty years for violations of section 846 when no specific quantity of drugs is proved or the amount of drugs is less than 100 grams of heroin, see 21 U.S.C. §§ 846, 841(a), 841(b)(1)(C); see also, e.g., United States v. Moreno, 94 Cr. 0165, 2000 WL 1843232 at *4 (S.D.N.Y. Dec. 14, 2000) (Sotomayor, D.J.) (explaining statutory scheme). Accordingly, Apprendi is inapplicable. See, e.g., United States v. Garcia, No. 00-1408, 2001 WL

167018 at *4 (2d Cir. Feb. 20, 2001) (even after Apprendi, "a guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury"); Valdez v. United States, 00 Civ. 9105, 2001 WL 29998 at *1 (S.D.N.Y. Jan. 8, 2001) ("Apprendi is inapplicable where, as here, petitioner was sentenced within the statutory maximum."); United States v. Castano-Vargas, 124 F. Supp. 2d 185, 187-88 (S.D.N.Y. 2000); United States v. Smith, No. 3:00CV1261, 2000 WL 1739305 at *4 (N.D.N.Y. Nov. 8, 2000); Garcia v. United States, 00 Civ. 6373, 2000 WL 1523283 at *1 (S.D.N.Y. Oct. 11, 2000) (Apprendi "has no bearing on a case in which the defendant was sentenced to the statutory maximum or less, which is what took place here.").

As for Moore's claim that his indictment was unconstitutionally vague, the indictment stated that Moore was involved in a conspiracy whose object was to distribute "one kilogram and more of mixtures and substances containing a detectable amount of heroin" and "five kilograms and more of mixtures and substances containing a detectable amount of cocaine." (See Dkt. No. 62: Indictment ¶¶ 2-3.) "In a drug conspiracy, the defendant is chargeable with the total quantity of drugs in any joint transaction in which he directly participated, plus any reasonably foreseeable amount in which his connection was more remote." Narvaez v. United States, 97 Civ. 8745, 1998 WL 255429 at *5 (S.D.N.Y. May 19, 1998) (Sotomayor, D.J.). Thus, it is of no consequence that the indictment did not specify an amount or type of drug for which Moore was personally responsible.

In any event, any error in Moore's indictment was waived and/or rendered harmless by virtue of his guilty plea. See, e.g., United States v. Calvert, No. 96-35261, 122 F.3d 1074

(table), 1997 WL 542108 at *2 (9th Cir. Aug. 28, 1997) (by pleading guilty petitioner waived claim that indictment was vague); United States v. Fairchild, 803 F.2d 1121, 1124 (11th Cir. 1986) (claim that indictment was vague waived by virtue of guilty plea); see also, e.g., Sanders v. United States, No. 99-2516, 2001 WL 25702 at *2 n. 2 (2d Cir. Jan. 2001) ("[R]elying on Apprendi, [petitioner] claims that the district court lacked jurisdiction over the narcotics count because the indictment did not allege the quantity of cocaine base he possessed. Because [petitioner] admitted at his plea allocution and sentencing to the quantity of cocaine base he possessed, any Apprendi error was harmless."); United States v. Walker, 228 F.3d 1276, 1278 n.1 (11th Cir.) ("As [defendant] pled guilty in this case and accepted the contents of the [presentence report], he lost any right to appeal on the basis of [Apprendi]."), pet. for cert. filed, No. 00-7657 (Dec. 26, 2000); Panoke v. United States, Nos. Civ. 00-00548, Crim. 94-02179, 2001 WL 46941 at *5 (D. Haw. Jan. 5, 2001) ("As Petitioner specifically admitted to the amount of drugs in his Plea Agreement, and did not challenge the PSR as to either the amount or quality . . ., he cannot now allege an Apprendi violation.").

CONCLUSION

For the reasons set forth above, Moore's petition is denied. Because the Second Circuit has not yet explicitly ruled on the validity of plea agreements containing § 2255 waivers, a certificate of appealability is granted, limited to that question. See, e.g., Lucidore v. New York State Div. of Parole,

209 F.3d 107, 112 (2d Cir.) (certificate of appealability should issue "if the issues involved in a petition are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further."), cert. denied, 121 S. Ct. 175 (2000).

SO ORDERED.

DATED: New York, New York
March 15, 2001

Andrew J. Peck
United States Magistrate Judge

Copies to: Samuel Moore
Paul D. Radvany, Esq.